IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-574

IN THE MATTER OF
JOHN JOSEPH MURRAY

Appellant

ON APPEAL FROM THE
SUPREME COURT OF INDIANA

MOTION TO DISMISS OR AFFIRM

SHELDON A. BRESKOW
DAVID B. HUGHES
814 ISTA Building
Indianapolis,
Indiana 46204
(317) 633-4454

Attorneys for Appellee

Indiana Supreme Court
Disciplinary Commission

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	ii
I. THE "STATE STATUTE" INVOLVED AND THE NATURE OF THE CASE. . .	1
A. The "Statute"	1
B. The Proceedings Below . . .	7
II. ARGUMENT.	8
THE QUESTIONS ARE SO UNSUBSTANTIAL AS TO NOT NEED FURTHER ARGUMENT.	8
A. Equal Protection.	8
B. Due Process	11
III. CONCLUSION.	14

TABLE OF AUTHORITIES

Cases

	Page
Alabama State Federation of Labor v. McAdory (1945), 325 U.S.450, 49 L.Ed.1725, 65 S.Ct. 1384.	11
Cohen v. Hurley (1961), 366 U.S. 117, 6 L.Ed.2d 156, 81 S.Ct.954.	9
Dohaney v. Rogers (1930), 281 U.S. 362, 74 L.Ed.904, 50 S.Ct.299. .	9, 12
In Re Murray (1977), ___Ind.___, 362 N.E.2d 128	4, 8
In Re Ruffalo (1968), 390 U.S.544, 88 S.Ct. 1222, 20 L.Ed.2d 117. .	12
Schware v. Board of Bar Examiners of New Mexico (1957), 353 U.S. 232, 77 S.Ct.752, 1 L.Ed2d 796 .	12
Tinsley v. Anderson (1898), 171 U.S.101, 43 L.Ed. 91, 81 S.Ct. 805	9
United States v. King (D.C. Fla., 1973), 368 F.Supp. 130.	13

Other Authorities

Code of Professional Responsibility for Attorneys at Law (Ind. R. A.D. 23, Sections 11 and 12). . . 2

Disbarment in the United States: Who Shall Do The Noisome Work? 12 Columbia Journal of Law and Social Problems 1, at pp.17-30 (1975). 13

Indiana Rules for Admission to the Bar and the Discipline of Attorneys:

Ind. R. A.D. 23, Section 13 . . . 2

Ind. R. A.D. 23, Section 14 . . . 4, 6, 7, 8, 10, 11

Ind. R. A.D. 23, Section 15 . . . 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-574

IN THE MATTER OF
JOHN JOSEPH MURRAY

Appellant

ON APPEAL FROM THE
SUPREME COURT OF INDIANA

MOTION TO DISMISS OR AFFIRM

SHELDON A. BRESKOW
DAVID B. HUGHES
814 ISTA Building
Indianapolis, Indiana 46204
317-633-4454

Attorneys for Appellee,
Indiana Supreme Court
Disciplinary Commission

MOTION TO DISMISS OR AFFIRM

The Appellee, Indiana Supreme Court Disciplinary Commission, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Indiana, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as to not need further argument.

I.

THE "STATE STATUTE" INVOLVED AND THE NATURE OF THE CASE

A. The "Statute"

This appeal seeks to question the federal constitutionality of a certain provision formerly among the Rules of the Supreme Court of Indiana regarding the admission and discipline of attorneys at law (Rules for Admission to the Bar and the Discipline of Attorneys, Burns Indiana Statutes Annotated, Code Edition, Court Rules, Book 2).

Indiana Admission and Discipline Rule 23 is the Rule which governs the procedure for instituting, hearing and determining charges of substantial professional misconduct against members of the Indiana Bar. The Appellee, Indiana Supreme Court Disciplinary Commission, is charged with the responsibility of filing a verified complaint against an attorney when the Appellee has determined from an investigation that reasonable cause exists to believe such attorney is guilty of professional misconduct in violation of the Code of Professional Responsibility for Attorneys at Law. (Ind. R. A.D. 23, Sections 11 and 12). The complaint of misconduct then is referred to a Hearing Officer to conduct a hearing and to make his written findings of fact and recommendation to the Supreme Court of Indiana (Ind. R. A.D. 23, Section 13). The Supreme Court of Indiana reviews the proceeding de novo

and enters judgment or such other order as is appropriate in the premises. (Ind. R. A.D. 23, Section 15). The standard of review of the Supreme Court of Indiana in such cases was most recently articulated in this very proceeding, as follows:

> "It should be noted at the outset that a disciplinary proceeding is an original action in this Court. Ind. Const., Art. 7, §4. As such, this Court sits as a trial court and must determine issues of fact; this clearly distinguishes the disciplinary proceeding from an appeal. In Re Pawlowski (1959), 240 Ind. 412, 165 N.E.2d 595.
>
> "Recognizing this distinction, in the absence of any agreement by the parties as to factual issues, this Court examines and reviews all matters which have been submitted in a particular cause. An examination of the previous opinions of this Court demonstrates that the findings of fact are only the initial starting point for review by this Court (citing cases). It is through this complete examination of all matters that this Court makes its ultimate findings of fact upon which a determination of misconduct is weighed.

> "The findings of the Hearing Officer thus are reviewed within this Court's consideration of all relevant matters. These findings do receive emphasis in that the Hearing Officer observes the witnesses, absorbs the nuances of unspoken communication, and by this observation attaches credibility to the testimony, but such findings are not necessarily controlling on this Court and never have been.
>
> "In the end, the finding of fact reached by this Court are the product of this Court's examination of the entire record with the above noted consideration being given to the findings of fact submitted by the Hearing Officer. Thus, there is no standard of review as applied within appellate procedure, but merely the application of a process of determination whereby this Court finds facts as is required in all original actions."
>
> In Re Murray (1977), ____Ind.____, 362 N.E.2d 128.

As originally adopted in 1970, effective June 23, 1971, Ind. R. A.D. 23, Section 14, provided in pertinent part the following respecting the procedure governing disciplinary cases subsequent to the filing of the misconduct complaint during the Hearing Officer stage:

"Section 14, Proceedings before the hearing officers.

"(a) The rules of pleading and practice in civil cases shall not apply. No dilatory motions shall be entertained. The case shall be heard on the complaint and an answer which may be filed by the respondent within thirty (30) days after notice of the filing of the complaint. An answer, if filed, may assert any legal defense. If the respondent shall elect to file an answer, he shall file six (6) copies with this court. An answer need not be filed, in which case the complaint shall be taken as denied. A respondent may on a showing of good cause petition for a change of hearing officer within ten (10) days after the appointment of such hearing officer.

"(b) The complainant and the respondent shall be given not less than fifteen (15) days written notice of the hearing date. The respondent shall have the right to attend the hearing in person, to be represented by counsel, to cross-examine the witnesses testifying against him and to produce and require the production of evidence and witnesses in his own behalf, as in civil proceedings.

"(c) The proceedings may be summary in form and shall be without the intervention of a jury and shall be reported.

"(d) Within thirty (30) days after the conclusion of the hearing, the hearing officers shall determine whether

misconduct has been proven by a preponderance of the evidence and shall submit to the Supreme Court written findings of fact and recommendations concerning disposition of the case. A copy of said findings and recommendations shall be served by the hearing officer on the respondent and the executive secretary of the disciplinary commission, at the time of filing same with the Supreme Court...."

The above provision was amended November 24, 1975, effective January 31, 1976, to provide among other things for various methods of pre-hearing discovery upon a showing of good cause. The amended provision was not applicable to the instant proceeding because the formal hearing in this matter was held in July, 1975.

Appellant contends that Ind. R. A.D. 23, Section 14, as in effect in 1975, which was construed in this case not to require pre-hearing discovery by way of motions to produce, interrogatories and oral depositions, violates the Due Process and Equal Protection clauses of the Fourteenth Amendment.

B. The Proceedings Below

The Appellant was charged by the Appellee with several counts of professional misconduct. After a Hearing Officer was appointed, the Appellant filed a motion for the production of documents by the Appellee and he also propounded interrogatories to Appellee. Additionally, Appellant filed notices regarding proposed pre-hearing depositions upon oral examination of various possible witnesses. The Appellee opposed discovery by way of motions to produce, interrogatories and depositions and the Hearing Officer concluded that such modes of discovery were not authorized by Ind. R. A.D. 23, Section 14.

The proceeding was eventually heard by the Hearing Officer and fully reviewed by the Supreme Court of Indiana. Appellant was permanently disbarred for gross professional misconduct. The Supreme Court of Indiana concluded, among other things, that the Appellant's inability to obtain pre-hearing discovery by

way of motions to produce, interrogatories and oral depositions did not constitute an abridgement of the Appellant's right to due process of law. In Re Murray, supra.

II.

ARGUMENT

THE QUESTIONS ARE SO UNSUBSTANTIAL AS TO NOT NEED FURTHER ARGUMENT

A. Equal Protection

Appellant urges that former Ind. R. A.D. 23, Section 14, violates the Equal Protection guarantee of the Fourteenth Amendment in that it fails to afford lawyers in disbarment proceedings the same pre-trial discovery methods available in Indiana generally to civil litigants and criminal defendants.

Appellant contends that this federal question is substantial "because there is little existing law which provides any guidance" (Appellant's Brief, p. 20). He cites no "existing law" on the point. It is the general rule that equal protection of the laws is not denied

by a course of procedure applied to legal proceedings in which a particular person is affected if the same procedure would be applied to all others similarly situated. Tinsley v. Anderson (1898), 171 U.S. 101, 43 L.Ed. 91, 81 S.Ct. 805. Different types of judicial proceedings may be classified and different types of procedure provided for each so long as the classification is reasonable. Dohaney v. Rogers (1930), 281 U.S. 362, 74 L.Ed. 904, 50 S.Ct. 299. A state constitutionally can afford a different procedure in attorney disbarment proceedings than is afforded in, for example, criminal proceedings. Cohen v. Hurley (1961), 366 U.S. 117, 6 L.Ed.2d 156, 81 S.Ct. 954. The interest of a state in the integrity and competency of its bar is so great that it

> "***could rationally conclude that the profession itself need not be subjected to the disrespect which would result from the publicity, delay and possible ineffectiveness...

> that might follow could miscreants only be dealt with through ordinary investigative and prosecutorial processes." Cohen v. Hurley, supra, 366 U.S. at 127.

The Appellant does not contend that he was treated differently from other attorneys similarly situated.

Appellant does not attempt to demonstrate how he suffered any injury in his disbarment proceeding by being unable to pursue carte blanche discovery. He does not contend that he was unable to defend himself adequately against the disbarment charges; that he was surprised by or otherwise unable effectively to meet the testimony of his accusers; that any testimony was lost to him by the unavailability of any witness; or that any prospective witness refused to give him a statement prior to hearing. In short, he has failed to contend or demonstrate how he was affected injuriously by former Ind. R. A.D. 23, Section 14. Such

failure is fatal to his argument that the Rule is unconstitutional. Alabama State Federation of Labor v. McAdory (1945), 325 U.S. 450, 89 L.Ed. 1725, 65 S.Ct. 1384.

B. Due Process

Appellant contends that former Ind. R. A.D. 23, Section 14, violated his right to Due Process of law by failing to provide for pre-hearing discovery.

Appellant has cited no authority for the proposition that Due Process clause of the Fourteenth Amendment guarantees pre-hearing discovery as is now the general custom in civil cases. The Commission is unaware of any such authority. Appellant misconstrues the scope of the Due Process guarantee.

> "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding

> and the character of the rights which may be affected by it." Dohany v. Rogers, supra, 281 U.S. at 362.

A fair hearing has never been said to turn upon the availability of pre-hearing discovery as by motions to produce, interrogatories or depositions. Indeed, Appellant does not contend that lack of pre-hearing discovery in fact deprived him of a fair hearing and he does not attempt to show in what manner he was injuriously affected by not being able to pursue carte blanche discovery.

It is, of course, true that a State cannot exclude a person from the practice of law or from any occupation in a manner that contravenes the Due Process clause of the Fourteenth Amendment. Schware v. Board of Bar Examiners of New Mexico (1957), 353 U.S. 232, 77 S.Ct.752, 1 L.Ed.2d 796. In a disbarment proceeding, the respondent is entitled to fair notice as to the reach of the grievance and a fair opportunity to be heard. In Re Ruffalo (1968), 390 U.S.544,

88 S.Ct. 1222, 20 L.Ed.2d 117. See also Article, Disbarment in the United States: Who Shall Do The Noisome Work?, 12 Columbia Journal of Law and Social Problems 1, at pp. 17-30 (1975). But no case or commentator has ever held or suggested that pre-hearing discovery as in civil cases is a guarantee of Due Process.

The only authority found by Appellee that discusses an issue remotely akin to the present one is United States v. King (D.C. Fla., 1973), 368 F.Supp.130. In King, a criminal defendant contended that he was denied Due Process by the refusal of the Government's witnesses to submit to pre-trial interviews. The District Judge rejected this contention and held that the additional burden of preparing for trial caused by the lack of cooperation of the witnesses did not constitute a deprivation of Due Process.

III.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as to not need further argument and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in this cause by the Supreme Court of Indiana.

Respectfully submitted,

Sheldon A. Breskow

David B. Hughes

Attorneys for Appellee
814 ISTA Building
Indianapolis, Indiana 46204
317-633-4454